IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF (PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE TO
DEFENDANTS' OMNIBUS MOTION *IN LIMINE* (Dkt. #2415)

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), hereby submits its response in opposition to Defendants' Omnibus Motion *in Limine* (Dkt. #2415) ("Defendants' Motion").

I. Argument

A. Evidence Relating To Nutrient Management Plans from Watersheds Other Than the IRW Should Not Be Excluded

Defendants improperly request an *in limine* order excluding from evidence nutrient management plans ("NMPs") from watersheds other than the Illinois River Watershed ("IRW"). (Defs.' Mot. at 1.) Defendants' challenges on Federal Rules of Evidence 402 and 403 grounds are unavailing.

First, evidence relating to NMPs from non-IRW watersheds is highly relevant to this case. NMPs from any watershed, but particularly a neighboring watershed with a similar geology, as is the case with the Eucha-Spavinaw watershed, have probative value because they go to show that Defendants knew or should have known that the land-application of poultry

waste would result in the type of environmental pollution at issue in this case. They also demonstrate the related fact that the excessive land application of poultry waste, with resulting increases in soil test phosphorus ("STP") levels, is part of an industry practice (including in the watershed right next door). Moreover, particularly the information gleaned from the Eucha-Spavinaw NMPs was utilized by the State's experts Bernie Engel and Bert Fisher in their waste assessments conducted in this case. Due to the close proximity of Eucha-Spavinaw and the fact that many of the same integrators operate in both watersheds and manage their growing operations out of the same complexes, information about the NMPs in the Eucha-Spavinaw watershed is very useful and relevant in this matter. The other major advantage of the data from the Eucha-Spavinaw watershed is that because the NMPs for that watershed were prepared under the same standards and under the supervision of the court master in *Tulsa v. Tyson*, they provide a uniform data set that cannot be duplicated by reference to similar plans from the IRW where NMPs are prepared pursuant to separate State poultry waste management systems where there is limited formal oversight.

While the State may not agree with Defendants, Defendants' argument that NMPs may reflect conditions not applicable to growers in the IRW may be the subject for cross-examination, but it in no way requires the exclusion of evidence from non-IRW watersheds. Moreover, the State believes it highly likely that Defendants will as part of their defense present evidence about pollution in other watersheds. The State should be permitted in response to show Defendants' contribution to such pollution, as well as the fact that wherever poultry waste is land-applied, it drives up STP levels.

Second, such evidence would not result in unfair prejudice to Defendants, and Defendants have not demonstrated, as they must under Rule 403, how the probative value of

such evidence as identified above is substantially outweighed by the risk of unfair prejudice to them.

Therefore, Defendants' Motion to exclude evidence of non-IRW nutrient management plans should be denied.

B. Evidence Relating To the *City of Tulsa* Case Should Not Be Excluded

Defendants seek to exclude "any testimony or documents concerning the *City of Tulsa v. Tyson Foods* case, Docket No. 01 CV 0900EA(C) (N.D. Okla.), and in particular . . . evidence concerning the settlement of that case." (Defs.' Mot. at 2.) As an initial matter, there is no basis to warrant an order *in limine* excluding such a broad universe of documents. Defendants' Motion to exclude *all* testimony or documents concerning *City of Tulsa* does not provide the Court with the necessary information to make such a sweeping ruling on the admissibility of the universe of evidence relating to an entire case. Such challenges – and related rulings – must be made on a document-by-document basis and only after the Court has considered the foundational evidence supporting each document's admission. Accordingly, Defendants' Motion as it relates to the *City of Tulsa* case must be denied.

1. Defendants' Rule 402 Objection

Defendants first argue that ***all*** documents relating to the *City of Tulsa* case are irrelevant because that case involved the Eucha-Spavinaw watershed, and not the Illinois River Watershed. This argument is a red herring for a variety of reasons.

First, Defendants have made no showing that all documents and testimony in *City of Tulsa* relate to just the Eucha-Spavinaw watershed. And in fact, they do not.

Second, in any event, the fact that a different (yet neighboring) watershed was involved in *City of Tulsa* does not render the documents and testimony in that case irrelevant here. As

stated above, the Eucha-Spavinaw watershed is a neighboring watershed with a similar geology. It is simply not credible to suggest that *any evidence* relating to that watershed can have no probative value to issues affecting the neighboring IRW.

Third, evidence pertaining to *City of Tulsa* is probative of Defendants' knowledge of the phosphorus problem that results from the excessive and/or inappropriate land application of poultry waste. For instance, certain deposition testimony taken in *City of Tulsa* may be relevant here, such as that of Ron Mullikin, who was employed by Defendant Peterson Farms, Inc. ("Peterson") from the fall of 1997 to approximately August of 2000 and who became Peterson's director of corporate training and environmental affairs.[1] During his deposition in the *City of Tulsa* case, Mr. Mullikin testified that the integrators, including Peterson, started gaining awareness of the problems with excess phosphorus in northwest Arkansas in the mid-1990s. A variety of other documents from the *City of Tulsa* case, and not just deposition testimony, are relevant to the same issue. (For example, in November 1998, Mr. Mullikin wrote a memorandum notifying Peterson executives that: "Time continues to pass with no new solutions of dealing with excess animal waste and environmental problems it is creating." (Dkt. #2474-6 (11/24/98 Mullikin Memo).)

Fourth, the consent decree in *City of Tulsa* is highly probative of the control Defendants exercise over their contract growers and the poultry waste generated by Defendants' birds. (*See* Dkt. #2062 (Fact #17 and exhibits thereto).)

Finally, as a general matter, within the universe of the *City of Tulsa* files sought to be excluded by Defendants are documents and testimony that constitute party admissions, in

[1] A more fulsome discussion of Mr. Mullikin's testimony in *City of Tulsa*, as well as the documents containing the quoted language, are provided in the State's Response in Opposition To Peterson Farms, Inc.'s Motion in Limine Regarding Former Employees (Dkt. #2474).

addition to deposition testimony that the State may wish to use because the witness is unavailable to testify live. Further, documents from the *City of Tulsa* case demonstrate that Defendants knew, or should have known, by at least 2003 that their waste disposal practices caused environmental problems generally, and specifically that their contractual arrangements with growers likely would lead to nuisances or trespasses, for purposes of Restatement (Second) of Torts § 427B liability.

In short, there is simply no basis to find, as Defendants suggest, that *all* documents and testimony from the *City of Tulsa* case be excluded on relevance grounds.

2. *Defendants' Rule 403 Objection*

Defendants also argue, in a single throwaway phrase, that *City of Tulsa* documents "can only confuse the trial with collateral issues and disputes." (Defs.' Mot. at 3.) This is hardly a serious objection. And Defendants certainly have not shown that the probative value of any and all *City of Tulsa* documents and testimony is substantially outweighed by the danger of . . . confusion of the issues . . . ." Fed. R. Evid. 403.

3. *Defendants' Rule 408 Objection*

Defendants further contend that the *City of Tulsa* Settlement Agreement and related documents should be excluded pursuant to Federal Rule of Evidence 408(a)(1), the rule governing the admissibility of "Compromise and Offers to Compromise." (Defs.' Mot. at 3.) While Defendants rely on Rule 408(a) as support for exclusion, Rule 408 itself provides that exclusion is not required. Specifically, Rule 408(b) provides: "Permitted uses. – This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). . . ." Here, such evidence fits into the exception set forth in Rule 408(b) because it would be offered to demonstrate the control that is and can be exerted by the integrators over their growers

and over the disposal of poultry waste. In this case, however, Defendants disclaim any such control, directly contradicting what occurred in *City of Tulsa*, which is illustrative of industry practice.

Defendants' argument that Rule 408(a) precludes the State from using the *City of Tulsa* agreement to demonstrate control is unavailing because subsection (a) seeks to protect confidential offers of compromise and statements made in confidential settlement negotiations. The *City of Tulsa* settlement constitutes neither. It is a consent decree, i.e., a public document that does not invoke the underlying policy concerns of Rule 408.

Moreover, Defendants' argument that the State should not be permitted to use the *City of Tulsa* settlement to demonstrate the poultry integrators' control over growers because, they claim, the Settlement Agreement does not show that they had any "preexisting" control over the growers may be an argument for cross-examination, but does not provide a basis to exclude such evidence. The fact that Defendants have a not-unexpected different view on the probative value of the agreement to show control goes only to the weight, and not to the admissibility, of the *City of Tulsa* settlement.

Finally, the probative value of the *City of Tulsa* settlement is not substantially outweighed by the danger of unfair prejudice to the non-signatory Defendants, and Defendants' one-sentence assertion to the contrary on page 5 does not require a different conclusion.

C. Evidence of the Locust Grove Incident Should Not Be Excluded by an Order *in Limine*

The so-called "Locust Grove incident" (involving an *E. coli* outbreak) is not the proper subject of any evidentiary limitation at this stage. Defendants' Motion in this regard should be denied.

First, while Defendants' Motion requests the wholesale exclusion of all evidence relating

to the Locust Grove incident, Defendants' have included such evidence on *their* trial exhibit list. (*See, e.g.*,, DJX 7688–7692.[2]) Defendants should therefore be precluded from now suggesting that such evidence should be precluded on grounds of relevance and unfair prejudice.

Second, although the State does not intend to put on evidence of the Locust Grove incident in its case-in-chief, the State anticipates that Defendants will contend at trial that the land application of poultry waste and/or any contamination of the water resulting therefrom has caused no health problems, at which point the Locust Grove incident would become relevant. Thus, if Defendants open the door on this point, the State should not be precluded from using evidence relating to the Locust Grove incident to rebut Defendants' argument.

Accordingly, Defendants' request for the unconditional exclusion of all evidence relating to the Locust Grove incident is not warranted.

D. Defendants' "Kitchen Sink" Objections To the State's Trial Exhibits Lack Specificity and Are Premature in Light of the Exhibit Conferences Scheduled for the Week of August 24, 2009

This portion of Defendants' Motion complains that "multiple exhibits" on the State's exhibit list are made up of multiple documents that Defendants do not believe are sufficiently related to be submitted as one exhibit. Defendants refer to these exhibits as "kitchen sink" exhibits. Defendants identify only two specific examples of exhibits from the State's trial exhibit list that they believe are "kitchen sink" exhibits, but beyond those examples provide no further specificity to their objection and no explanation as to which other trial exhibits their Motion is applicable.

Defendants' Motion was the first time that the State was made aware that Defendants have this objection to any of its trial exhibits, as their Motion was filed prior to the parties

[2] Should the Court wish to receive copies of these exhibits, the State will be happy to provide them.

exchanging trial exhibit objections on August 14, 2009. Although Defendants have numerous exhibits that are likewise "kitchen sink" exhibits – some of which contain hundreds of items – the State did not file a similar motion *in limine* pertaining to trial exhibits because such matters should first be addressed by the parties to determine if any resolution can be reached on these issues before burdening the Court. In fact, the State objected to 79 of Defendants' joint trial exhibits on the grounds that they contained multiple documents. However, the State not only anticipated that the parties would be addressing these matters with each other before bringing them to the Court, but also appreciated that the Court could not rule on this issue without the specific exhibits at issue being identified.

In short, this matter is not the proper subject of a motion *in limine*, but rather should be addressed by the parties during the upcoming trial exhibit conferences, which are scheduled for the week of August 24, 2009. The parties should attempt to resolve their objections to these types of exhibits, which were submitted by both sides, and then determine which specific exhibits, if any, require the Court's attention. Thus, the State respectfully requests that the Court deny this aspect of Defendants' Motion. Any ruling on these exhibits, if one is required, should occur only after the parties have had a chance to meet and confer on exhibit objections and the parties' final lists of objections are filed with the Court at the end of this month. Until then, it is entirely possible that objections may be altered or withdrawn, "kitchen sink" exhibits themselves may be withdrawn or separated, and the parties may be able to reach some understanding on this issue that impacts both Defendants' trial exhibit list and the State's trial exhibit list.

E. The Court Should Reject Defendants' Mischaracterization of Discovery Responses Regarding Bird Count Data, Which Are Admissible as Party Admissions

Mischaracterizing the State's proposed Exhibits 65 (Dkt. #2419-8) and 166 (Dkt.

#2419-3) — which contain highly relevant data and party admissions regarding Defendants' bird counts — as "concerning the parties' past discovery disputes" (Defs.' Mot. at 9), Defendants' request to exclude those exhibits is nothing but an ill-conceived straw man argument. (*See* Defs.' Mot. at 9.) Simply put, the State is not offering these or any other exhibits as evidence of the parties' discovery disputes, and Defendants' attempt to exclude relevant evidence on the ground that it was the subject of a discovery dispute is specious.

"An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence." Fed. R. Civ. P. 33(c). Where, as here, the interrogatory answers are those of a *party opponent*, they are admissible as admissions under Federal Rule of Evidence 801(d)(2)(A). *See, e.g., Gridiron Steel Co. v. Jones & Laughlin Steel Corp.*, 361 F.2d 791, 794 (6th Cir. 1966); *see also Huthnance v. District of Columbia*, 255 F.R.D. 297, 300 (D.D.C. 2008) ("there is no better example of an admission of a party opponent, which is admissible because it is not hearsay, than an answer to an interrogatory" (internal quotation marks omitted)).

In the present case, Defendants set up a straw man by contending that the State seeks to introduce their admissions as evidence of "earlier discovery disputes" and that such disputes are irrelevant and unfairly prejudicial. (*See* Defs.' Mot. at 9.) To the contrary, the State's proposed Exhibits 65 and 166 contain Defendants' responses to the State's Interrogatory No. 1, which include highly relevant data and related statements regarding Defendants' bird counts. The fact that these responses were subject to a discovery dispute has no bearing on their content, and it is their content that the State seeks to introduce. Defendants do not — and cannot — challenge the substantive relevance of their responses to Interrogatory No. 1.[3] Therefore, the Court should

[3] Instead, Defendants misleadingly emphasize an e-mail exchange between counsel for the State and counsel for the George's Defendants. (*See* Defs.' Mot. at 9.) The relevance of that e-mail exchange is explained as follows. In response to a discovery order of the Court dated

deny this request.

F. Defendants' Arguments Regarding Fed. R. Evid. 1006 Are Premature, Lack Specificity, Should Have Been Addressed with the State Prior To the Filing of Their Motion Pursuant To the Agreement Between the Parties, and Can Be Addressed at the Upcoming Exhibit Conferences

Defendants complain that various exhibits on the State's exhibit list fail to meet the requirements of Federal Rule of Evidence 1006. Like the issues set forth in Section D above regarding so-called "kitchen sink" exhibits, Defendants' Motion was the first time the State was made aware of Defendants' objections to these documents.

Defendants' Motion as it pertains to Rule 1006 objections is surprising because the parties reached an agreement for Rule 1006 exhibits, namely, that "[i]f opposing counsel can not readily locate the specific data or information referenced within the documents previously produced by the offering party(ies), copies of the data or information summarized will be provided upon request." (*See* Ex. A, May 21, 2009 R. George letter to L. Bullock and June 3, 2009 L. Bullock letter to R. George accepting terms of agreement.) If Defendants had simply reached out to the State about their Rule 1006 objections, the parties could have worked on a resolution to this issue without prematurely and unnecessarily burdening the Court. It is unfortunate that Defendants instead decided to disregard the agreement between the parties and file their premature Motion, which lacks all specificity in terms of the trial exhibits it seeks to exclude, with only one exception.

December 7, 2007 (Dkt. #1409), all but the George's Defendants provided the State, in the form of supplemental discovery responses, the relevant data and interrogatory answers offered in the State's proposed Exhibits 65 and 166. The George's Defendants, however, provided their response in an e-mail and ultimately declined to submit a formal, supplemental response. Accordingly, the State has included that e-mail exchange of the George's Defendants, just as it has included the supplemental responses of the other Defendants.

In any event, this matter is not proper for a motion *in limine*, but rather should be addressed by the parties during the upcoming exhibit conferences, which are scheduled for the week of August 24, 2009. The parties should attempt to resolve their objections to Rule 1006 exhibits, which were submitted by both sides (the State has made numerous objections pursuant to Defendants Rule 1006 Exhibits), and then determine which specific exhibits, if any, must be brought to the Court's attention. Hopefully, the parties will be able to resolve many Rule 1006 objections using the terms of the agreement between counsel referenced above. Thus, the State respectfully requests that the Court deny this aspect of Defendants' Motion. The appropriate time for any ruling, if one is required, is after the parties have had a chance to meet and confer on exhibit objections and the parties' final lists of objections are filed with the Court at the end of this month. Until then, it is entirely possible that objections may be altered or withdrawn, exhibits themselves may be withdrawn, and the parties may be able to reach some understanding on this issue that impacts both Defendants' trial exhibit list and the State's trial exhibit list.

As to Defendants' arguments regarding declarations by Dr. Fisher (*see* Defs.' Mot. at 10-12), these were not trial exhibits subject to Rule 1006, but exhibits to summary judgment motions. Because the Court has ruled on these summary judgment motions, these objections specific to Docket Nos. 2178-13 and 2182-11 are moot.

II. Conclusion

For the foregoing reasons, the Court should deny Defendants' Motion *in Limine* (Dkt. #2415).

Respectfully Submitted,

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I hereby certify that on this 20th day of August, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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